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January 23, 2013

VIA E-MAIL & CERTIFIED MAIL

Thomas A. Benson
Trial Attorney
Environmental Enforcement Section
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611

Mr. Craig Melodia
Associate Regional Counsel
U.S. Environmental Protection Agency - Region 5
77 West Jackson Boulevard (C-14-J)
Chicago, IL 60604-3590

Re: Ashland Site – National Historic Preservation Act Review

Dear Messrs. Benson & Melodia:

On behalf of Northern States Power Company of Wisconsin, Inc. ("NSPW"), this letter concerns the proposed review under the National Historic Preservation Act ("NHPA") by the City of Ashland's contractor, Heritage Research, Ltd. ("Heritage"), at the Ashland/Northern States Power Lakefront Site (the "Site"). NSPW believes that the review is not required, and if it was, the regulations and EPA's guidance specify that it was to have occurred at the beginning of the CERCLA process, preferably at Remedial Investigation Stage. NSPW is extremely concerned about the delay this review will cause to the schedule set forth in the Uplands Consent Decree and related work documents. This delay will impact our schedule for work at the Site and will not serve the local public interest.

NSPW's position is that neither the car barn nor the waste water treatment plant ("WWTP") is eligible for the National Register of Historic Places (the "National Register") for many reasons, including those outlined in the City of Ashland memorandum dated January 9, 2013, from Katie Meyer to Pete Mann, and the proposal letter from Heritage dated January 21, 2013, from Traci Schnell to Katie Meyer. As both of these documents make clear, neither structure meets the requirements for eligibility under the NHPA. Not only do the structures lack the "criteria for evaluation" set forth at 36 C.F.R. § 60.4 (e.g., they are not associated with significant historical events or persons, they are not distinctive, and they will not yield any important historic information), they have both been substantially altered over the

years, which by definition makes them **ineligible** for listing. *See* 36 C.F.R. § 60.4, *Criteria Considerations*.

In addition, the regulations make plain that the proposed review by Heritage is untimely. The regulations provide:

(c) *Timing*. The agency official must complete the section 106 process **prior to the approval of the expenditure of any Federal funds** on the undertaking or prior to the issuance of any license. This does not prohibit agency official from conducting or authorizing nondestructive project planning activities before completing compliance with section 106, provided that such actions do not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties. **The agency official shall ensure that the section 106 process is initiated early in the undertaking's planning, so that a broad range of alternatives may be considered during the planning process for the undertaking.** (emphasis supplied).

See 36 C.F.R. § 800.1. Here, the plain language of the regulations makes clear that the NHPA review should take place early in the process so that any impact of the NHPA can be considered as the Site and the remedy are first being evaluated. An early review allows potentially responsible parties ("PRPs") contemplating settlement with EPA to fully consider the facts of the Site, and the implications of any historic or cultural structures on the remedial investigation process. EPA's own guidance amplifies the point by stating that the review for potential cultural or historic sites needs to happen at the Interagency Review Letter stage, and certainly before finalizing the RI/FS Workplan. *See* CERCLA Compliance With Other Laws Manual: Part II. EPA/540/G-89/009, OSWER Directive 9234.1-02, August 1989, at pages 4-2 – 4-11.

In addition, here, the statement of work for the Site has already been approved in a final settlement between the parties (through the Uplands Consent Decree), which is also now a final order of the court. To the extent there were any community concerns about the NHPA review process, those could have been raised during the public comment period for the Consent Decree, not after the fact as field work is being undertaken. In short, it is our view that the NHPA review process proposed for the Site is occurring far too late in the process, in direct contradiction of the regulations governing the process itself, and in contradiction to the executed and binding Consent Decree.

Nevertheless, in an effort to resolve this issue in the quickest manner possible, NSPW will agree to fund its share of the Heritage review up to \$1400.00, and we have informed the City of Ashland of our intention to cooperate. To the extent access is desired to our property to take photos or to gather other documentary information that can be archived regarding the structures before they are demolished, we are willing to consent to that access (upon request) as long as that work is performed within the next 30 days as well (so as to avoid further delays to work at the site) and subject to any safety protocols that may need to be adhered to.

Please understand that in no event will we support a finding of "eligibility", and we reserve all rights to challenge the review in the event that either structure is erroneously deemed "eligible" for listing on the National Register. Significantly, the NHPA provides that "listing"

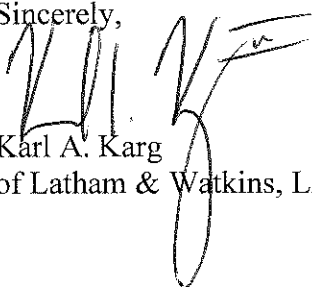
cannot occur without the consent of the owner¹, which, in the case of the car barn, is NSPW. NSPW will not give its consent for listing, and we believe the City of Ashland will likely take the same position with respect to the WWTP. Therefore, this entire exercise from our perspective is ultimately a non-substantive procedural exercise.

NSPW must also reserve its right to object or challenge the review if the review period extends beyond the 30-day period contemplated in the regulations.² Based on our understanding of the situation, all interested parties believe that Heritage will make a recommendation of "no eligibility" for the reasons provided above. NSPW requests the assistance of the City, EPA and Wisconsin DNR in expediting the 30-day review process so that work can begin as soon as possible at the Site. In the event that the SHPO disagrees with Heritage, NSPW will request that demolition proceed as already authorized by EPA despite the finding.

Importantly, the remedy embodied in the Uplands Consent Decree requires removal of the car barn and the WWTP and it is in the public interest to demolish these structures. For example, the WWTP must be removed to stage the thermal desorption unit, which NSPW agreed to stage in this area based on public concerns about noise, odors, and general disruption. Likewise, the community has expressed a strong desire that the demolition occur during the winter months, when windows at the nearby school and other buildings will be closed. Simply put, NSPW has no interest in renegotiating the particulars of the Uplands Consent Decree and NSPW's believes it is in the public interest to promptly move forward with the demolition of these structures.

In summary, while we are willing to cooperate and help fund the Heritage review for purposes of resolving this issue quickly, NSPW does not agree that the review is required and NSPW intends to move forward with demolition activities in early March. We request that EPA inform as soon as possible within the next 30-days whether we can mobilize demolition crews to the site consistent with prior authorizations.

Sincerely,



Karl A. Karg
of Latham & Watkins, LLP

¹ 16 U.S.C. § 470a(6), provides: "If the owner or owners of any privately owned property, or a majority of the owners of such properties within the district in the case of an historic district, object to such inclusion or designation, such property shall not be included on the National Register or designated as a National Historic Landmark until such objection is withdrawn."

² 36 C.F.R. § 800.4(d)(1)(i) provides that after Heritage submits the survey to the State Historic Preservation Act Officer ("SHPO") with a determination of "no eligibility", the SHPO must object within 30 days or the review is deemed complete.

cc: Dick Yde
Pete Mann

U.S. ENVIRONMENTAL
PROTECTION AGENCY

WASH. D.C. 20460

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